# ARTICLE

## TOWARD A THEORY OF INTERTRIBAL AND INTRATRIBAL COMMON LAW

*Matthew L.M. Fletcher**

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* Assistant Professor, Michigan State University College of Law; Director, Michigan State University Indigenous Law and Policy Center; Appellate Judge, Pokagon Band of Potawatomi Indians, Turtle Mountain Band of Chippewa Indians, and Hoopa Valley Tribe; Enrolled Member, Grand Traverse Band of Ottawa and Chippewa Indians. Chi-miigwetch to Sam Deloria for introducing the Author to the notion of an "intertribal common law." Miigwetch to Kirsten Carlson, Phil Frickey, Carole Goldberg, Myriam Jaïdi, Wenona Singel, Joe Singer, Alex Skibine, Kevin Washburn, and Rob Williams for reviewing and providing challenging and supportive comments upon previous drafts. This Article was supported by the generosity of the University of North Dakota New Scholar Award.

## I. INTRODUCTION

Imagine a woman driving along a highway in North Dakota. A man, a resident of South Dakota, driving a truck crashes into the woman's vehicle. The woman suffers massive injuries and spends twenty-four days in the hospital. Her family retains an attorney and sues the other driver in a North Dakota county where the accident occurred. The defendant files a motion to dismiss on the theory that a North Dakota county court has no jurisdiction over him. The court denies the motion, and that decision is affirmed on appeal. The case moves to trial.

Now imagine a woman driving along the same highway, except it is within the exterior boundaries of a reservation of the Mandan, Hidatsa, and Arikara Nation, located in North Dakota. A man, a resident of South Dakota, driving a truck crashes into the woman's vehicle. She suffers massive injuries and spends twenty-four days in the hospital. Her family retains an attorney and sues the other driver in the reservation's tribal court. The defendant files a motion to dismiss on the theory that the tribal court has no jurisdiction over him. The court denies the motion, and that decision is affirmed on appeal. The case does not move to trial because the defendant brings a claim in federal district court seeking an injunction against the tribal court on the theory that the tribal court has no jurisdiction over him. This time, the defendant's motion is granted.

Why?

The second fact pattern is a simplified and modified version of the facts that the Supreme Court reviewed in *Strate v. A-1 Contractors*.[1] Automobile accidents are common in every jurisdiction within the United States.[2] Indian Country is no

1. Strate v. A-1 Contractors, Inc., 520 U.S. 438, 442–44 (1997). The Court in *Strate* concluded that the tribal court could not have jurisdiction over the lawsuit because the accident occurred on non-Indian land—a state-maintained highway. *See id.* at 455–56.

2. *Cf.* Car-Accidents.com, 2000 Car Accident Statistics: Fatalities by State, http://www.car-accidents.com/pages/stats/2000_by_state.html (last visited Sept. 21, 2006) (providing car accident fatalities statistics by state).

exception.[3] In the first fact pattern, the denial of the motion to dismiss on jurisdictional grounds is an easy and noncontroversial question. In the Indian Country fact pattern, the question of jurisdiction is the most important question in the case. It appears that the question of tribal court civil adjudicatory jurisdiction is one of the most important and controversial questions in American Indian law.[4] The reason Indian Country is different is the Supreme Court's fear that tribal courts will apply a common law that prejudices nonmembers.[5]

American common law originates in a common law that evolved over centuries in Britain, moved across the ocean to the United States, and survived the Revolution.[6] This Anglo-American common law developed in accordance with the mores of English and American culture and was marked with a powerful dose of formalism.[7] For example, at common law, the essentials to an enforceable contract were "the use of parchment or paper, sealing by the obligor, and delivery as a deed, normally witnessed and attested."[8] One purpose of these formalities was to make

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3. *See, e.g.*, C. Matthew Snipp, *The Size and Distribution of the American Indian Population: Fertility, Morality, Migration, and Residence*, 16 POPULATION RES. & POL'Y REV. 61, 76 (1997) (recognizing automobile accidents to be the primary cause of death among young American Indians).

4. American "Indian Law" is defined by Ninth Circuit Senior Judge William Canby as "that body of law dealing with the status of the Indian tribes and their special relationship to the federal government, with all the attendant consequences for the tribes and their members, the states and their citizens, and the federal government." WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 1 (4th ed. 2004). "In this application, 'Indian Law' might better be termed 'Federal Law About Indians.'" *Id.* "Tribal law" is defined as the law of the various and individual federally recognized Indian tribes in the United States. *See id.* at 3 (including "the internal law that each tribe applies to its own affairs and members" and ranging "from oral tradition to entire codes borrowed nearly intact from non-Indian sources").

5. Federal Indian law classifies people in three ways: first, "members," or people who are enrolled members or citizens of a federally recognized Indian tribe; second, "nonmembers," or people who are not "members;" and third, "nonmember Indians," a term used in the criminal jurisdiction context to refer to Indians within the jurisdiction of a tribe not their own. *See, e.g.*, United States v. Lara, 541 U.S. 193, 210 (2004) (addressing the congressionally granted authority of a tribe to prosecute a "nonmember Indian" for criminal misdemeanor); United States v. Wheeler, 435 U.S. 313, 326 (1978) (distinguishing between a tribal court's jurisdiction over "members" and "nonmembers").

6. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 15 (1973) ("The basic substratum of American law . . . is English."); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 291–305 (Inst. of Early Am. History and Culture ed., 1998) (discussing the development of a distinctly American system of law and politics in the context of the American Revolution).

7. *See* A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 5 (1975) ("The medieval common law was a formulary system, whose content and basic structure were determined, to a very considerable extent, by the catalogue of original writs in the Register.").

8. *Id.* at 90 (citation omitted).

clearer "any signs of monkey business."[9] The common law of contract, for example, has since moved away from the formal requirement of a seal for a somewhat less formal requirement of consideration.[10]

In contrast, tribal common law evolved from a much different source of culture and attendant policy considerations. While it is impossible to generalize, we can be sure that many Indian communities held inviolate an oral promise without any formalities at all, for example.[11] Contracts between Indians came in contexts of "long-run relationships with trading partnerships . . . [that] build trust and reliance among the parties."[12] Tribal communities did engage in a type of formalism that could mark a contract, although the underlying exchange often was of "gifts," not merchandise.[13] Unlike Anglo-American common law that derived from "status,"[14] tribal common law derived from "[p]ublic consensus and harmony."[15] It should be easy to observe from this comparison that American common law and tribal common law derive from different cultures and traditions on a fundamental level.

Federal and state courts apply Anglo-American common law as they always have,[16] but tribal courts have unusual difficulty identifying and applying tribal common law.[17] For a variety of

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9. *Id.*

10. *See* CHARLES FRIED, CONTRACT AS PROMISE 28 (1981) (explicating the Anglo-American doctrine of consideration).

11. *See, e.g.*, Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (Part II), 46 AM. J. COMP. L. 509, 548 (1998) ("[C]ontracts are valid traditionally by mutual consent. Neither writing, nor consideration, nor witnesses is required.").

12. *Id.* at 547.

13. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 228 (1941) ("[N]o price was set beforehand for services to be rendered, so that the compensation was phrased, and in good part felt, as a gift given in appreciation for a helpful act.").

14. *Cf.* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 553 (1933) ("One of the most influential of modern saws is Maine's famous dictum that the progress of the law has been from status to contract").

15. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 11 (1975). *See generally* JOHN BORROWS, RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW 56–76 (2002) (discussing Aninishaabe and Canadian Aboriginal common law as applied in Canadian courts).

16. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890–96 (1986) (defining "'federal common law'" and examining its application). While "[c]onsiderations of federalism and separation of powers combine to make us skeptical about courts formulating very broad federal common law," federal courts continue to make law both through pronouncements of law and through interpretation. *Id.* at 890–96, 931; *see also* Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 927–31 (2004) (contrasting the state and federal courts' abilities to create common law).

17. *See* Alex Tallchief Skibine, *Troublesome Aspects of Western Influences on Tribal*

reasons relating to the history of federal Indian policy,[18] tribal courts rely upon Anglo-American common law to decide many, if not most, of the cases before them.[19] Tribal courts have made a strong effort to restore tribal, rather than Anglo-American, custom and tradition to their adjudicatory decisionmaking,[20] but the process is slow.

Members of the Supreme Court appear to have assumed that tribal courts apply a tribal common law that is so far from Anglo-American common law as to be unrecognizable to non-Indians.[21] This assumption arises in the context of a tribal court exercising civil jurisdiction over nonmembers. In 2001, the Supreme Court decided *Nevada v. Hicks*, an unremarkable case holding that tribal members may not sue in tribal court for the on-reservation tortious conduct and civil rights violations of state officials investigating off-reservation breaches of state law.[22] To be sure, scholars and tribal leaders criticized the decision more for its reasoning than its holding,[23] which is very narrow. The Court left

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*Justice Systems and Laws*, 1 TRIBAL L.J. (2000), http://tlj.unm.edu/articles/volume_1/skibine/index.php (identifying several efforts by the federal government to influence tribal common law and discussing "some of the problems associated with efforts to 'integrate' tribal justice systems into the United States political system").

18. *See id.* (reviewing the federal government's attempted imposition of Western norms on the tribal judiciary, influence on Indian culture, and integration of Indian tribes).

19. *E.g.*, Kalantari v. Spirit Mountain Gaming, Inc., 32 Indian L. Rep. 6079, 6080 (Grand Ronde Tribal App. Ct. May 16, 2005) (on file with the Houston Law Review) (basing decision on U.S. law).

20. *E.g.*, Navajo Nation v. Crockett, 7 Navajo Rtpr 237, 240 (Navajo Sup. Ct. 1996), *available at* http://www.tribal-institute.org/opinions/1996.NANN.0000006.htm (deciding a free speech claim on the basis of tribal custom and tradition, saying "Navajo common law is the law of preference in the courts of the Navajo Nation").

21. *See infra* note 58 (explaining Justice Rehnquist's use of precedent to arrive at the conclusion that Indian courts will not treat non-Indians appropriately).

22. Nevada v. Hicks, 533 U.S. 353, 374–75 (2001).

23. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 457–59 (2005) (criticizing the Court for its growing tendency to shrink tribal authority proactively while ignoring foundational Indian law); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 278–79 (2001) (observing that the Court's recent jurisprudence rebukes traditional deference to Congress and turns a blind eye to precedent); Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1607 (2004) (criticizing recent Supreme Court jurisprudence as "devastating," noting that decisions over "the last three decades . . . have seriously eroded . . . inherent tribal judicial authority"); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 647–48 (2003) (speculating that in *Hicks*, the Court constricted tribal authority, permitting regulation of consenting parties only); Alex Tallchief Skibine, *Making Sense Out of* Nevada v. Hicks*: A Reinterpretation*, 14 ST. THOMAS L. REV. 347, 349 (2001) ("[O]ne of the fundamental problems with the Court's analysis stems from its failure to adequately conceptualize the . . . tribal 'right to exclude.'"); *cf.* Ronald Eagleye Johnny, Special Feature, Nevada v. Hicks*: No Threat to Most Nevada Tribes*, 25 AM. INDIAN L.

open very important and fundamental questions regarding the civil jurisdiction of tribal courts to adjudicate the rights of nonmembers.[24] As Justice Scalia wrote for the majority, "We leave open the question of tribal-court jurisdiction over nonmember defendants in general."[25] While the question of tribal court civil jurisdiction over nonmembers rages in the federal courts, the Court has not yet decided the issue.[26] The Court's most recent statement came in dicta in 1997, where the Court "assumed that 'where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts,' without distinguishing between nonmember plaintiffs and nonmember defendants."[27]

The real concern amongst tribal advocates in the aftermath of *Hicks* was the surprising concurrence by Justice Souter, who wrote what amounts to an opening attack on the future application of tribal law to nonmembers.[28] Though the application of tribal law to nonmembers was not squarely before the Court in *Hicks*,[29] Justice Souter took the time to lay the framework for a broad holding in future cases that tribal law should *never* apply to nonmembers.[30] Despite the fact that several years have passed

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REV. 381, 381 (2002) (arguing that Nevada tribal courts tend to require express nonmember consent before taking jurisdiction over the nonmembers); Edwin Kneedler, *Indian Law in the Last Thirty Years: How Cases Get to the Supreme Court and How They Are Briefed*, 28 AM. INDIAN L. REV. 274, 277 (2003) (identifying the *Hicks* decision as unsurprising because the case involved state law enforcement officers defending their official conduct). *See generally* Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 411 (2003) (searching for the constitutional foundation of the holding in *Hicks*).

24. *Hicks*, 533 U.S. at 358 n.2.

25. *Id.*

26. *E.g.*, Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1128–29 (9th Cir. 2006) (en banc) ("[A] non-Indian plaintiff consents to the civil jurisdiction of a tribal court by filing claims against an Indian defendant arising out of activities within the reservation where the defendant is located."), *cert. denied*, 126 S. Ct. 2893; Wilson v. Marchington, 127 F.3d 805, 813–14 (9th Cir. 1997) (affirming that absent an authorizing statute or treaty, tribal courts lack subject matter jurisdiction over claims against nonmembers arising out of their conduct on state highways); MacArthur v. San Juan, 391 F. Supp. 2d 895, 934 (D. Utah 2005) ("The full extent of implicit divestiture has yet to be determined, resulting in no small amount of uncertainty and confusion as to the scope of tribes' inherent civil authority over non-indians . . . ." (citations omitted)).

27. *Hicks*, 533 U.S. at 358 n.2 (quoting Strate v. A-1 Contractors, Inc., 520 U.S. 438, 453 (1997)).

28. *See id.* at 375–85 (Souter, J., concurring).

29. *See id.* at 356–57 (majority opinion).

30. *See id.* at 381 (Souter, J., concurring) ("[I]t is undeniable that a tribe's remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the

since Justice Souter characterized tribal law in this fashion, no scholar has responded in a direct manner to this description. This Article argues that Justice Souter's characterization of the "substantive law" that tribal courts apply is an oversimplification of the on-the-ground realities of tribal law.

This Article attempts to create a simple and reasonable framework by which judges, lawyers, and scholars can classify tribal law. "Tribal law" as applied by tribal courts is not monolithic.[31] This Article divides tribal law or "tribal common law" into two broad categories—"intertribal common law" and "intratribal common law." As a general matter, intertribal common law is the common law applied by tribal courts to cases arising out of an Anglo-American legal construct, such as an employment contract.[32] Intertribal common law tends to mirror federal and state common law, with some differences. Intratribal common law, by contrast, is the common law applied by tribal courts and other tribal dispute resolution venues to disputes arising out of a tribal legal construct, such as the inheritance rights to on-reservation hunting territories.[33] Intratribal common law often is the unwritten and unique customary and traditional law deriving from Indian culture and languages. It is the law of the Indigenous communities from time immemorial. This Article will show that intratribal common law will not, except in extraordinary circumstances, apply to cases where nonmembers are a party in interest. Distinguishing in an intelligent manner between intertribal and intratribal common law should allay fears from the Justices that "outsiders" will be disadvantaged by tribal courts.

Part II of this Article describes the open question before the Court—whether tribal courts have civil jurisdiction over

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individual over whom jurisdiction is claimed, not on the title to the soil on which he acted.").

31. *See* NELL JESSUP NEWTON ET AL., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.05[3] (Nell Jessup Newton et al. eds., Matthew Bender 2005) (1941) ("[I]t may be a mistake to equate tribal tradition and custom with tribal common law, because tribal common law may be a broader category . . . .").

32. *See, e.g.*, Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM 273, 290–315 (2005) (noting the need for improvements in the law of tribal employment separation that give credence to Tribal communities' unique needs).

33. *See generally* Russel Lawrence Barsh, *Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1 (2005) (examining the Puget Sound's and Gulf of Georgia's indigenous peoples' prevailing paradigm of environmental controls); Frank G. Speck, *The Family Hunting Band as a Basis of Algonkian Social Organization*, 17 AM. ANTHROPOLOGIST 289, 290 (1915) (surveying kinship groups from various tribes and their respective laws, including property and social rules).

nonmembers in general. Part II will describe *Nevada v. Hicks* and the recent cases that identify "fairness to outsiders" as a possible serious problem in tribal court adjudication of nonmember rights, examining in detail Justice Souter's *Hicks* concurrence. Part III provides a theory of differentiating between intertribal common law and intratribal common law, providing examples in several subject areas of tribal court adjudication of how the theory of differentiation could work in the real world. Part IV concludes the Article with a call for the federal courts to recognize the difference between intertribal and intratribal common law, with a concomitant recognition that nonmembers are not prejudiced by the application of tribal law by tribal courts. Part IV also offers a preliminary response to the concerns and questions that may be raised by the application of this theory. This Article concludes that the recognition of different kinds of tribal common law by federal courts will meet the twin goals of preserving and advancing tribal sovereignty and protecting the rights of nonmembers.

## II. SUPREME COURT JURISPRUDENCE REGARDING TRIBAL COURT CIVIL JURISDICTION OVER NONMEMBERS

Tribal governments have long exercised civil regulatory jurisdiction over nonmembers.[34] Indian treaties recognized in an implicit manner the authority of tribes to control and regulate the conduct of non-Indians passing through reservation lands.[35] Federal courts have long held that an Indian tribe's right to tax nonmembers conducting business in Indian Country is "inherent."[36] Indian tribes have the power to exclude nonmembers from their territories[37] and to place conditions on their continued presence.[38] As a corollary, tribal courts also have

34. According to the Supreme Court, Indian tribes do not have criminal jurisdiction over non-Indians. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

35. *E.g.*, Treaty with the Sioux Indians art. 16, U.S.-Tribes of Sioux Indians, Apr. 29, 1868, 15 Stat. 635, 640 (prohibiting any "white person" from settling upon, occupying, or passing through Sioux Indian land without their consent).

36. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 134–41 (1982) ("inherent"); Montana v. United States, 450 U.S. 544, 565 (1981) ("A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.").

37. *See* NEWTON ET AL., *supra* note 31, § 4.01[2][e] ("A tribe needs no grant of authority from the federal government to exercise the inherent power of exclusion from tribal territory, either as a government or as a landowner.").

38. *Id.* § 4.01[2][f] (explaining tribal authority over reservation land to include a regulatory power over nonmember entrants).

the authority to adjudicate the rights of nonmembers in civil cases.[39]

But in recent decades, the Supreme Court has placed severe limitations on the authority of Indian tribes and tribal courts to exercise jurisdiction over nonmembers.[40] American Indian law scholars have long objected to the Court's results and approach.[41] Professor Phil Frickey describes the Court's approach as a form of "ruthless pragmatism" when it comes to tribal sovereignty.[42] This Part identifies the relevant cases and discusses the possible underlying reasons for the Court's approach.

### *A. The* Montana *Rule and Justice Souter's "Difficulty"*

In 1959, the Supreme Court opened what Professor Charles Wilkinson called the beginning of the "modern era of

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39. *E.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Civil jurisdiction over [nonmember, on-reservation conduct] presumptively lies in the tribal courts unless affirmatively limited [by treaty or statute]."); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 854–55 (1985) (concluding that Congress's divesting tribal courts of jurisdiction over criminal matters only, shows a clear intent to leave tribal courts jurisdiction over civil matters); Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc., 32 Indian L. Rep. 6148, 6150 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. Aug. 5, 2005) (noting that the tribal court's jurisdiction over civil actions extends to the limits of the Constitution and laws of the Tribe and the United States); Bank of Hoven v. Long Family Land & Cattle Co., 32 Indian L. Rep. 6001, 6003 (Cheyenne River Sioux Tribal App. Ct. 2004) (affirming the lower court's exercise of jurisdiction over a nonmember based on the nonmember's consensual agreement with a tribal member).

40. *E.g.*, Nevada v. Hicks, 533 U.S. 353, 374 (2001) (holding that tribal courts do not have jurisdiction over civil suits brought against state officers acting in their official capacity); Strate v. A-1 Contractors, Inc., 520 U.S. 438, 459 (1997) (concluding that tribal courts do not have jurisdiction over civil suits brought against nonmembers where the underlying incident took place on a state-controlled right-of-way inside of Indian Country); *Montana*, 450 U.S. at 565–66 (adopting a presumptive rule that tribes do not have civil jurisdiction over nonmembers, absent two exceptions); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (finding that tribes do not have criminal jurisdiction over non-Indians). *See generally* NEWTON ET AL., *supra* note 31, § 4.02[3] (pulling together case law and scholarly works to chronicle judicial limitations placed on tribal sovereignty in the civil and criminal contexts).

41. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 57 (1999) ("On their own terms, the [Court's] opinions congeal into an incoherent muddle."); Getches, *supra* note 23, at 278–79 (characterizing the Court's approach to Indian law as improper subjectivism); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1620–30 (1996) (same); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 6–10 (2003) (blaming the antitribal decisions on the Court's failure to integrate its general federalism jurisprudence into Indian law).

42. Frickey, *supra* note 23, at 436.

federal Indian law"[43] in *Williams v. Lee*.[44] *Williams* served to legitimate the existence of tribal courts by denying state court jurisdiction over a small claims suit brought against a Navajo Nation member by a nonmember business operator doing business within the Navajo reservation.[45] The Court's holding meant that nonmembers suing the tribe or tribal members must seek judicial relief in the tribe's courts, a critical decision in favor of tribal sovereignty, and a decision that guaranteed the future of tribal courts.[46] But in that case, a tribal member was the defendant in tribal court.[47] It was a different question for the Court when a nonmember was the defendant or otherwise subject to a tribe's police powers.[48]

In 1981, the Court articulated a general rule that Indian tribes have no civil jurisdiction over nonmembers—with two exceptions—in *Montana v. United States*.[49] There the Court held that the authority of Indian tribes over the "'*relations between an Indian tribe and nonmembers of the tribe*'" has been implicitly divested as a function of a tribe's "'dependent status.'"[50] In the criminal context, that implicit divestiture of tribal authority is absolute,[51] but in the civil context, there are two exceptions. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[52] Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[53]

The *Montana* Court gave no underlying federal common law or public policy reasoning or justification for the general rule. The Court relied upon its decision in *Oliphant v. Suquamish*

43. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987).

44. Williams v. Lee, 358 U.S. 217 (1959).

45. *Id.* at 223.

46. *See id.* at 218, 223.

47. *Id.* at 217–18.

48. *See* Strate v. A-1 Contractors, Inc., 520 U.S. 438, 442 (1997) (establishing that tribal courts have no jurisdiction over claims against nonmembers arising out of accidents on state highways located within tribal territory).

49. Montana v. United States, 450 U.S. 544, 564–66 (1981).

50. *See id.* at 564 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)).

51. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (finding tribal courts to possess no inherent jurisdiction in criminal suits against nonmembers).

52. *Montana*, 450 U.S. at 565.

53. *Id.* at 566.

*Indian Tribe*—a case adopting a bright line rule that tribes may not exercise criminal jurisdiction over nonmembers[54]—for the general principle that Indian tribes have no civil jurisdiction over nonmembers either.[55] *Oliphant* is one of the more notorious Supreme Court decisions in terms of its near-complete lack of plausible legal authority to support the Court's conclusion that Indian tribes had no criminal jurisdiction over nonmembers.[56] The *Oliphant* Court, in contrast to more recent Supreme Court cases discussing tribal sovereignty, gave little or no pragmatic or public policy reasoning for its decision.[57] Instead, as Professor Charles Wilkinson suggested, the Justices voted on their "own visceral reaction" to the case.[58] Professor Wilkinson did presage a pragmatic reason for the Court's reluctance to extend tribal

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54. *Oliphant*, 435 U.S. at 212. The *Oliphant* Court seemed to hold that tribes could not exercise criminal jurisdiction over any nonmembers—a conclusion confirmed by the Court in *Duro v. Reina*, 495 U.S. 676, 688 (1990)—but the state of law now, after Congressional tinkering, is that tribes may exercise criminal jurisdiction over members and nonmember Indians. *See* United States v. Lara, 541 U.S. 193, 197–98 (2004) ("[S]oon after this Court decided *Duro*, Congress enacted new legislation specifically authorizing a tribe to prosecute Indian members of a different tribe.").

55. *See Montana*, 450 U.S. at 565. The Court also cited Justice Johnson's concurrence in *Fletcher v. Peck* for the proposition that Indian tribes have no jurisdiction over nonmembers, but a careful review of the *Fletcher* opinion makes it clear that Justice Johnson said no such thing. *See* Fletcher v. Peck, 10 U.S. 87, 143–48 (1810) (Johnson, J., concurring).

56. The list of distinguished commentators that have criticized Justice Rehnquist's opinion on this ground includes, without limitation: T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY 106–08 (2002) (calling the central reasoning behind *Oliphant* a "muddle" and "none-too-clear"); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 187–215 (1997) ("[I]t was the disingenuous methodology, the questionable historical arguments, and the unclear rationale used by Rehnquist to justify this opinion that were especially disquieting."); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 97–113 (2005) ("*Oliphant*, as written by Rehnquist, cites, quotes, and relies upon racist nineteenth-century beliefs and stereotypes . . . ."); Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 616–35 (1979) (describing *Oliphant* as a "failure of judicial craftsmanship"); Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 11–16 (1995) (citing *Oliphant*'s significant impact despite its "flawed reasoning and unsubstantiated assertions").

57. *Compare Oliphant*, 435 U.S. at 211–12 (finding no inherent power for tribal courts to prosecute and punish non-Indians), *with Lara*, 541 U.S. at 210 (recognizing an inherent power to prosecute nonmember Indians).

58. WILKINSON, *supra* note 43, at 43. Quoting language out of context from a case called *Ex parte Crow Dog*, Justice Rehnquist implied that tribal courts would "'tr[y nonmembers], not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .'" *Oliphant*, 435 U.S. at 210–11 (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883)). Professor Rob Williams identified the missing language in the ellipses as referring to, among other things, Indians' "savage life" and "the red man's revenge by the maxims of the white man's morality." WILLIAMS, JR., *supra* note 56, at 109.

criminal jurisdiction over nonmembers—"civil liberties of United States citizens"[59]—although the Court had rejected similar arguments before the *Oliphant* decision.[60]

This reason for rejecting tribal jurisdiction over nonmembers has been labeled the "democratic deficit" by Dean T. Alexander Aleinikoff.[61] Dean Aleinikoff suggests that the Court's concern goes further—nonmembers "cannot readily become voting members," in contrast to citizens who move from state to state.[62] This class of citizens is "permanently excluded from political participation."[63] These persons would not be in a position to participate in local politics, without the concomitant potential to seek a change in the law. There are three elements to the "democratic deficit"—Indian tribes, in general, do not allow nonmembers to "vote in tribal elections, run for tribal office, or serve on tribal juries."[64] But these elements are an illusion.[65]

> To borrow an old analogy, a resident and citizen of Colorado who defaults on a loan in Utah may be subject to the legal processes of Utah, even though she is not a citizen there. The Court focuses on the possibility that she has legal status sufficient to some day acquire citizenship in Utah, in contrast to a non-Indian who might not [have legal status to attain tribal membership]. But at the time the Colorado citizen's loan is adjudicated, *she is not a citizen of Utah*. Moreover, should the Colorado citizen move to Utah and become a citizen of Utah, her changed status could not alter the result the Utah courts' adjudication of her loan.[66]

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59. WILKINSON, *supra* note 43, at 43.

60. *See* Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 519 (1979) (citing United States v. Mazurie, 419 U.S. 544, 557–58 (1975) (holding that respondents' non-Indian status did not preclude them from Tribal Counsel's authority to regulate the sale of liquor), and Williams v. Lee, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations.")).

61. *See* ALEINIKOFF, *supra* note 56, at 115.

62. *Id.* at 116.

63. *Id.*

64. *Id.* at 115.

65. *See* Matthew L.M. Fletcher, *The Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. [hereinafter *Legal Culture War*] (forthcoming 2006) (manuscript at 9–11), *available at* http://ssrn.com/abstract=882831 (characterizing the "so-called democratic deficit problem" as "an illusion"); Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, FED. LAW., Mar-Apr. 2006, at 38, 40 (same); *see also* Frickey, *supra* note 23, at 466 (criticizing Justice Kennedy's approach as "question-begging.").

66. *Legal Culture War*, *supra* note 65, at 11. Thanks to Kristen Carpenter for

The Colorado citizen is in the same position she would be in if she were a non-Indian subject to the legal processes of a tribe. Her status as a nonmember, like her status as a nonresident of a state, makes no difference.

In addition, the Court's worry about serving on juries is more than a little specious for two reasons. First, as Professor Kevin Washburn showed, federal prosecutors prosecute large numbers of reservation Indians in large cities, far from their "peers" on the reservation and in spite of the unfamiliar proceedings of federal courts.[67] Second, the Court's jurisprudence on tribal civil jurisdiction renders impotent tribal court attempts to compel nonmembers to respond to tribal jury summonses.[68] Assuming more tribes sought to expand nonmember rights to political participation as a means of showing the courts that there is no "democratic deficit," their ability to do so is hamstrung by the very doctrine to which they are attempting to respond.

The Court, instead, seems to assume a particular view of tribal law—that tribal substantive law is not fair to nonmembers.[69] Justice Kennedy's majority opinion in *Duro v. Reina*, a case where the Court held that Indian tribes had no criminal jurisdiction over nonmember Indians,[70] states that the underlying reason for rejecting tribal court jurisdiction over nonmembers is that tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often 'subordinate to the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.'"[71] The Court believes that tribal law is

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suggesting this analogy.

67. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 710–11 (2006) (discussing, among other things, the almost-foreign setting of such a proceeding); *see also* United States v. Nakai, 413 F.3d 1019, 1022 (9th Cir. 2005) (concluding that a venue transfer which may have reduced the number of Native Americans attending jury duty, "deprive[ing the defendant] of a fair representation of the community," did not violate the Sixth Amendment), *cert. denied*, 126 S. Ct. 593 (2005).

68. *Cf.* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647–48 (2001) (holding that tribes may not tax nonmembers conducting business on non-Indian owned fee land within the Navajo Reservation).

69. Duro v. Reina, 495 U.S. 676, 693–94 (1990) (examining basic differences between tribal and federal courts, and finding the former to deny certain constitutional protections).

70. *See id.* at 688. Congress amended the Indian Civil Rights Act in a successful attempt to overturn the result in *Duro*. *See* United States v. Lara, 541 U.S. 193, 197–98 (2004) (citing 25 U.S.C. § 1301(2) (1994)).

71. *Duro*, 495 U.S. at 693 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 334, 335 (1982)).

unfair to nonmembers.[72] It is this line of reasoning, not the amorphous notion of the social contract, which drives the Court.

Justice Souter's concurrence in *Hicks*, the first comprehensive attack on tribal law as applied to nonmembers, lays out the major thrust of the argument why substantive tribal law should not apply to nonmembers. He quotes two respected commentators on tribal common law for the proposition that the substantive law applied by tribal courts "would be unusually difficult for an outsider to sort out."[73] The first commentator, Dean Nell Jessup Newton, conducted one of the first empirical studies of tribal court common law decisionmaking.[74] Justice Souter chose to highlight her observation that tribal courts "'ha[ve] leeway in interpreting' the [Indian Civil Rights Act's (ICRA)] due process and equal protection clauses and 'need not follow the U.S. Supreme Court precedents' jot-for-jot.'"[75] The second commentator, Ada Pecos Melton, had participated in one of the first serious and mainstream symposia regarding the importance of tribal courts in the federal system.[76] Justice Souter quoted Ms. Melton for the proposition that "tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'"[77] Justice Souter then collapsed all forms and categories of tribal law into this summation: "The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' . . . which would be unusually difficult for an outsider to sort out."[78]

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72. *Id.* ("The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.").

73. Nevada v. Hicks, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring).

74. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 290–91 (1998) (digesting eighty-five tribal court opinions, surveying their legal bases in the broader context of tribal and other jurisprudence).

75. *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (quoting Newton, *supra* note 74, at 344 & n.238).

76. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (1995). Other participants and commentators included Yale law professor Judith Resnik, the then-United States Attorney General Janet Reno, the then-Chief Judge of the Ninth Circuit J. Clifford Wallace, and the then-Chief Justice of the Arizona Supreme Court Stanley G. Feldman. *See* Symposium, *Indian Tribal Courts and Justice*, 79 JUDICATURE 110 (1995).

77. *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (quoting Melton, *supra* note 76, at 130–31).

78. *Id.* at 384–85 (citation omitted) (quoting NAT'L AM. INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 43 (1978)).

Justice Souter erred when he combined all forms of "tribal law" into this "complex mix." As this Article will show, tribal law is not monolithic in the manner that Justice Souter suggests. A careful review of the article by Dean Newton shows that tribal courts decide their cases using Anglo-American common law more often than not.[79] Perhaps more critical is that a careful review of Ms. Melton's article shows that her subject matter—tribal customary and traditional law—applies *only to members* except where a nonmember expresses his or her consent to the proceedings (and also where the members consent to the presence of the nonmember).[80] Justice Souter implied that the consequence of all this "difficult" tribal law is that nonmembers, or "outsider[s]" as he terms them, will suffer prejudice in their ability to adjudicate before tribal courts in accordance with tribal law.[81]

Justice Souter's error is endemic to much on-the-ground tribal court practice involving nonmembers and their nonmember counsel. Few take the time to learn the law of Indian tribes. And, while it may be true that tribal common law is not as simple to discover as state or federal common law, "much of the information is acquired in the same way other legal education is acquired."[82] Tribal common law often is available online and in

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79. *See* Newton, *supra* note 74, at 305 (commenting that of the cases surveyed, only a few were not decided based on state or federal common law).

80. Perhaps the classic example of this arrangement is under the so-called "Duro fix," where Congress affirmed the inherent authority of Indian tribes to prosecute nonmember Indians in accordance with intertribal common law. *See* United States v. Lara, 541 U.S. 193, 197–98 (2004). Tribes could prosecute these consenting nonmember Indians in accordance with intratribal common law, although few if any have done so, because, in typical cases—if not the vast, vast majority of cases—the nonmember Indian has moved onto the reservation community through intermarriage or employment or other social arrangement. *See* Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 LAW & SOC'Y REV. 1123, 1143–44 (1994) (discussing how such nonmembers have become part of the Indian community in a way that non-Indians cannot).

81. *Hicks*, 533 U.S. at 384–85.

82. BORROWS, *supra* note 15, at 25. Moreover, Justice Steven's opinion in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, the case creating the tribal court exhaustion doctrine, stated that one benefit to requiring tribal court exhaustion before a federal court can review whether a tribal court has civil jurisdiction over nonmembers is that it "will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of [tribal court] expertise in such matters in the event of further judicial review." *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985); *see also* FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 95 (1995) ("The Court, without articulating and perhaps without even realizing it, appears to be gradually identifying the contours of the relationship of tribal courts to the federal system.").

published reporters.[83] But, as any tribal court judge can attest, lawyers appearing in tribal courts every working day often *refuse* to learn tribal court rules or to seek out substantive tribal court decisions and tribal statutes.[84] Justice Souter's opinion gives lazy attorneys an excuse to not prepare before appearing in (and thereby disrespecting) tribal courts.

Moreover, Justice Souter's opinion assumes without discussion that tribal courts will always apply tribal law.[85] Practice in tribal courts suggests that tribal courts would, if asked, adopt a choice of law doctrine similar to the one followed by federal courts where they would apply nontribal law to decide questions involving nonmember rights.[86] In other words, tribal courts would apply the substantive law of the jurisdiction with the most significant relationship to the underlying dispute.[87] But tribal law, as should be expected, will be the choice of law in on-reservation disputes.

### *B. The Open Question Following* Hicks

Justice Souter's concurrence in *Hicks* is directed at a future case to be decided by the Court, addressing the question left open in *Hicks* and the case preceding it, *Strate v. A-1 Contractors*—"We leave open the question of tribal-court jurisdiction over nonmember defendants in general."[88] This open question may be one of the more fundamental questions for Indian tribes in the 21st century. It is well-settled that Indian tribes have both criminal and civil jurisdiction over their own members.[89] But, as

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83. *See* Tribal Court Clearinghouse, http://www.tribal-institute.org/lists/tribal_law.htm (last visited Sept. 21, 2006) (providing, among other things, links to tribal courts, constitutions, laws, codes, and court decisions).

84. *See, e.g.*, J. Edythe Chenois, et al., *Just Like a "Real" Court*, WASH. ST. BAR ASS'N NEWS, Nov. 2002, http://www.wsba.org/media/publications/barnews/archives/2002/nov-02-real.htm (familiarizing attorneys with the modern tribal court and noting that "many attorneys do not have the opportunity to learn about how tribal courts work until" they find themselves there).

85. *Hicks*, 533 U.S. at 383–85 (Souter, J., concurring).

86. Newton, *supra* note 74, at 300 & n.52.

87. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971) (listing the applicable policies of interested states and the degree of interest of those states among several factors relevant to a court's choice of law decision); *see also* Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 731–32 (1990) ("If more than one state has a real interest in the case, the courts should apply the law of the state that has the most significant relationship to the parties and the transaction or occurrence . . . .").

88. *Hicks*, 533 U.S. at 358 n.2.

89. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63–64 (1978) (citing the Indian Civil Rights Act of 1968 (ICRA) for its mandate that states may not have civil or criminal jurisdiction in Indian Country without tribal consent); Williams v. Lee, 358 U.S. 217, 220 (1959) ("[I]f the crime was by or against an Indian, tribal jurisdiction or that

Professor Wenona Singel noted, nonmembers pervade Indian Country:

> In reality, non-members participate in nearly all aspects of tribal life. They work as employees in both tribal business enterprises and tribal government. They live in tribal housing with their enrolled spouses, parents, or children. They participate in tribal commerce, stay as guests in tribal hotels, and travel through tribal lands. In addition, in many tribes, non-members participate in tribal government by serving as members of tribal boards, commissions, and judiciaries.[90]

A tribe's authority to regulate on-reservation nonmember conduct and a tribal court's authority to adjudicate the rights of nonmembers is fundamental to meaningful tribal self-governance.

The Members of the Roberts Court recognize that the *Oliphant* decision contained little or no pragmatic or public policy reasoning for why Indian tribes should not have criminal jurisdiction over nonmembers.[91] Justice Kennedy attempted to provide a pragmatic public policy justification for protecting nonmembers from tribal court criminal jurisdiction[92]—the presumed unfairness of tribal substantive law—and Justice Souter's *Hicks* concurrence is an attempt to extend that logic to civil jurisdiction.[93] While Justice Souter's argument has had a half-decade or more to settle, the Court awaits the next challenge to tribal court civil jurisdiction from a nonmember. A Supreme Court decision guided by the mistaken view of a monolithic tribal common law could be a disaster for Indian Country. Tribal sovereignty, a critical bulwark against the disintegration of tribal culture and traditions, would erode further. Tribal members would be forced to leave the reservation and their homes to seek civil relief against nonmembers, including tortfeasors, deadbeat dads, and every other nonmember liable to them. Tribal members, many of whom cannot afford legal representation in

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expressly conferred on other courts by Congress has remained exclusive.").

90. Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691, 714–15 (2004) (citations omitted).

91. *See, e.g.*, United States v. Lara, 541 U.S. 193, 205 (2004) (indicating that Congress has power to "modify or adjust" status of tribes exercising authority over nonmembers); *id.* at 215 (Thomas, J., concurring) (arguing that plenary authority of Congress over Indian tribes is inconsistent with notions of tribal sovereignty).

92. *Id.* at 211–12 (Kennedy, J., concurring).

93. *Hicks*, 533 U.S. at 375 (Souter, J., concurring).

state and federal courts, often would be left without effective legal remedies.[94]

## III. A THEORY OF "INTERTRIBAL COMMON LAW" AND "INTRATRIBAL COMMON LAW"

Tribal courts are not organic or Indigenous,[95] but Indian tribes have made great strides in taking cultural and legal ownership of them. Indian tribes in the modern era of self-determination and self-governance have adapted tribal courts, once tools of assimilating, "civiliz[ing]," and "educat[ing]" reservation Indians,[96] to suit their own purposes and needs—and the purposes and needs of nonmembers. Tribal courts are now tools of adaptation, not assimilation. More than 250 Indian tribes have adopted tribal courts, and the rest have adopted one or more mechanisms of dispute resolution.[97] And many tribal court systems include more than one type of court.[98] Some courts mirror state and federal courts,[99] while more traditional courts are more informal and rely upon traditional and customary procedure and practice.[100] Some of these traditional courts operate under a system that rejects much of the adversarial system of adjudicating disputes.[101]

Though much has been written about the subject of tribal courts and tribal law, little is known. Scholars and commentators writing about tribal courts can differentiate without difficulty the procedures and infrastructure of tribal courts that mirror federal and state courts and those tribal courts that are based on

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94. *See* Gabriel S. Galanda, *BAR NONE! The Social Impact of Testing Federal Indian Law on State Bar Exams*, FED. LAW., Mar.-Apr. 2006, at 30, 32 (citing an American Bar Association study published in 1994 which estimated that "only 20 percent of Indian peoples' legal needs are met").

95. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113–20 (1983) (attributing the rise of Courts of Indian Offenses to necessity).

96. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888).

97. *See generally* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, EXECUTIVE SUMMARY, PATHWAYS TO JUSTICE: BUILDING AND SUSTAINING TRIBAL JUSTICE SYSTEMS IN CONTEMPORARY AMERICA 5–6 (2005).

98. *See* Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 139–41 (1995) (describing "five general categories" of developing tribal courts).

99. *E.g.*, Michael D. Petoskey, *Tribal Courts*, 67 MICH. B.J. 366, 367 (1988) ("These modern tribal courts have developed from adaptations of state and federal court systems.").

100. *E.g.*, Vicenti, *supra* note 98, at 141 ("Several Pueblos adjudicate transgressions and solve problems in accordance with age-old practices.").

101. *See* Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 264–66 (2000) (discussing the "marked difference[s]" in Anglo-American and tribal courts).

customary and traditional methods of dispute resolution.[102] But in the area of tribal law, scholars and commentators either ignore or do not differentiate between the substantive common law applied by the different courts. Discussion of the differences between these two categories of tribal common law, in fact, is necessary to preserve tribal cultures.

This Article provides a rough theoretical framework for distinguishing between two very different categories of substantive tribal law as applied by tribal courts. Such work is necessary for the preservation of tribal law and culture. As Anishinaabe and Canadian legal scholar John Borrows wrote:

> [Tribal] legal traditions are strong and dynamic and can be interpreted flexibly to deal with the real issues in contemporary . . . law concerning [Indian] communities. Tradition dies without such transmission and reception. Laying claim to a tradition requires work and imagination, as particular individuals interpret it, integrate it into their own experiences, and make it their own. In fact, tradition is altered by the very fact of trying to understand it. It is time that this effort to learn and communicate tradition be facilitated, both within [Indian tribes] and between [Indian tribes] and [other] courts.[103]

Borrows's statement serves as a template for the broader argument in favor of tribal sovereignty. Tribal sovereignty is not a claim to power and authority for their own sake, but a tool to preserve the culture and traditions of Indian people.[104] Tribal sovereignty shields Indian people and Indian tribes from the assimilative effects of non-Indian society imposed through non-Indian governmental control.[105] It follows that tribal law, as the manifestation of internal tribal sovereignty, should operate to reflect and preserve tribal culture and traditions.

But tribal law serves more than one purpose. Tribal law also must allow Indian tribes to interact and survive in a political and legal world dominated by the United States and the various individual states. Tribal law can reduce the distance between the

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102. Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 28 (1997) (comparing and contrasting various aspects of Anglo-American and tribal courts).

103. BORROWS, *supra* note 15, at 27 (footnote omitted).

104. DELORIA & LYTLE, *supra* note 95, at 105–08 (discussing the challenges of modern efforts to reinvigorate tribal sovereignty while preserving customs and traditions).

105. *Cf.* Whitney Kerr, *Giving up the "I": How the National Museum of the American Indian Appropriated Tribal Voices*, 29 AM. INDIAN L. REV. 421, 423–25 (2004) ("In the hands of the federal government, tribes have lost their claims to individuality. In between attempts at obliteration, the federal government has shown a tendency to homogenize tribal culture.").

American economic, legal, and political arena. Substantive tribal common law reflects those two interests.

### *A. Intertribal Common Law*

*1. The Theory.* "Intertribal common law" is the substantive common law applied by tribal courts in cases arising out of an Anglo-American legal construct. It is this Author's sense that the vast majority of tribal court cases arise out of an Anglo-American legal construct. Intertribal common law includes the common law decisions of other tribal courts and may include a tribal court's importation of federal and state court common law. Tribal courts create intertribal common law, for example, when litigants ask the court to interpret a statute such as the ICRA[106] or a tribal secured transactions code.[107] Tribal courts create intertribal common law when they adopt a common law rule of another tribal court or a federal or state court, such as the doctrine of sovereign immunity.[108]

An "Anglo-American legal construct" is any legal construct or relationship that has been imported into Indian Country, modeled upon a non-Indigenous legal construct.[109] Tribal courts modeled on state and federal courts are Anglo-American legal constructs. Tribal constitutions modeled upon the "Model [Indian Reorganization Act (IRA)] constitution"[110] are Anglo-American legal constructs. Tribal housing leases, tribal employment contracts, tribal casino financing deals, tribal sovereign immunity, and common law tort, contract, and property law causes of action and defenses are all Anglo-American legal constructs. Indian tribes imported some of these constructs by choice, but outsiders imposed many others.[111] As a function of

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106. 25 U.S.C. §§ 1301–41 (2000).

107. *E.g.*, National Tribal Justice Resource Center, Secured Transactions Ordinance of the Bay Mills Indian Community, *available at* http://www.tribalresourcecenter.org/ccfolder/bmsecured.htm (last visited Sept. 21, 2006).

108. *E.g.*, One Hundred Eight Employees of the Crow Tribe of Indians v. Crow Tribe of Indians, No. 89-320, at paras. 47–52 (Crow App. Ct. Nov. 21, 2001), *available at* http://www.tribal-institute.org/opinions/2001.NACT.0000001.htm. (citing federal principles of sovereign immunity).

109. For purposes of this Article, a "legal construct" is a legal concept or model. It may include, without limitation, a statute, a doctrine of common law, and legal or political infrastructure, such as a court, a governing body, and an executive agency.

110. *See* Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81, 92–93 (1993) (describing often enacted model constitutions as "largely 'boilerplate'" documents that frequently did not reflect tribal values).

111. *See id.* at 82 ("In the 1880s, . . . the United States shifted from dealing *with*

coexisting within non-Indian American society, some Indian tribes have taken these non-Indigenous constructs and made them, as much as possible, more consistent with tribal culture, while other communities have adopted them in haste or without detailed consideration as need arises.[112] At this point in history, where Indian tribes have begun to see success in their long struggle to preserve their cultures, economies, and even lives using the legal constructs available to them,[113] it is not possible or even desirable to expel all Anglo-American legal constructs from Indian Country.[114]

*2. The Practice.* Despite the dearth of theorization behind the use of intertribal common law, the wide majority of tribal courts apply intertribal common law in almost every decision involving nonmembers.[115] As the theory of intertribal common law suggests, tribal courts apply intertribal common law in a wide variety of tribal court cases, including drug-related civil forfeiture cases, contracts with nonmember businesses, and tort claims.[116] In *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100*, for example, the Muscogee (Creek) Nation Supreme Court upheld the authority of the tribal government to "regulate public safety through civil laws that restrict the possession, use or distribution of illegal drugs."[117] The statutes applied to the matter—the tribal legislature's codification of laws that prohibit the possession and use of certain drugs and the confiscation of property related to the possession and use of illegal drugs[118]—were Anglo-American legal constructs. The federal common law that established the tribal government's exclusive jurisdiction over the casino parking lot where the tribal police found the drugs; the federal common law that established the Nation's authority to regulate the

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Indian nations as governments to dealing *within* Indian nations, . . . [seeking] to destroy tribal governments through the forced assimilation of Indian people.").

112. *Id.* at 93–94 (critiquing the widespread adoption of boilerplate constitutions and noting an increased desire among tribes to amend these constitutions to better reflect tribal values).

113. *See generally* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 271–72, 330–38 (2005) (discussing legal and policy frameworks of modern Indian tribes, including tribal sovereignty and self-rule, and focusing particularly on tribes' efforts to establish casinos by using Anglo-American legal constructs such as litigation and congressional lobbying).

114. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21 (2000), the single most intrusive legal construct relating to tribal economic development, is also the most indispensable. *See generally* Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. (forthcoming 2007), *available at* http://ssrn.com/abstract=895900 (examining federal interests in protecting Indian gaming rights and advancing a legal structure that will best apportion the resulting stream of revenue).

nonmembers' on-reservation actions; and the federal treaty reserving to the tribal government certain rights as against state and federal intrusion are all Anglo-American legal constructs.[119] Even the tribal police's actions were modeled upon American law enforcement tactics.[120] There's nothing wrong with the Nation's choices in this case—the drug ("crystal meth") came from outside the community, brought by nonmembers to the tribal casino, and so it is reasonable for the Nation to employ an outside legal construct in response.[121] Most tribal court cases—and almost all tribal cases that involve nonmembers in significant ways—do the same thing.

When an Indian tribe engages in commercial business operations both on and off the reservation, the tribal courts resolving the disputes that arise out of these transactions employ intertribal common law to resolve them. *Confederated Tribes of Grand Ronde v. Strategic Wealth Management, Inc*. is a good example of a circumstance where tribal law adopted Anglo-American legal constructs as a means of adaptation to modern transactional and business needs.[122] There, the Tribes brought suit in tribal court to vacate an arbitration panel's award of

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115. *See, e.g.*, Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100, 32 Indian L. Rep. 6133, 6134 (Muscogee (Creek) Nation Sup. Ct. Apr. 29, 2005) (electing not to apply Title 14 of the Muscogee (Creek) Nation's code because the appellant was a non-Indian).

116. *See id.* at 6133 (adjudicating a drug-related civil forfeiture case); *see also* Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc., 32 Indian L. Rep. 6148 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. Aug. 5, 2005) (examining agreements with nonmember businesses under federal and state law); Sullivan v. Mashantucket Pequot Gaming Enter., 32 Indian L. Rep. 6128 (Mashantucket Pequot Tribal Ct. May 31, 2005) (reviewing a tort claims case under state common law standards).

117. *See Muscogee (Creek) Nation*, 32 Indian L. Rep. at 6133, 6135.

118. *See id.* at 6133–34 (citing 14 MUSCOGEE (CREEK) NATION CODE ANN. § 2-101(I) and 22 MUSCOGEE (CREEK) NATION CODE ANN. § 2-101(9)).

119. *See id.* (citing, among other authorities, 27 MUSCOGEE (CREEK) NATION CODE ANN. § 1-102(A) (defining territorial jurisdiction limits), 27 MUSCOGEE (CREEK) NATION CODE ANN. § 1-102(B) (defining civil jurisdiction limits), Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (noting tribes' broad range of civil jurisdiction over non-Indians on reservations), and Indian Country v. Oklahoma, 829 F.2d 967, 971 (10th Cir. 1987) (holding as a matter of federal law that the same tract of land and gaming facility where the criminal acts addressed in *Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100* took place are part of the original treaty lands held by the Nation and subject to the civil authority of the Muscogee (Creek) Nation)).

120. *See id.* at 6133.

121. *Id.* at 6133.

122. Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc., 32 Indian L. Rep. 6148 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. Aug. 5, 2005).

attorney fees and costs to the Tribes' former business partners, Strategic Wealth Management (SWM) and Paradigm Financial Services, Inc. (Paradigm), nonmember-owned businesses.[123] The tribal court granted the relief because the Tribe "did not waive its sovereign immunity in any of the agreements it entered into with [SWM]."[124] The underlying contract (a contract relating to financial and investment services) and the arbitration clause, coupled with its incorporation of tribal sovereign immunity, were all Anglo-American legal constructs utilized by the Tribes.[125] The tribal code provisions establishing subject matter jurisdiction mirrored federal rules in significant ways.[126] The federal common law allowing for tribal court jurisdiction over the nonmembers and the defenses raised by SWM were all Anglo-American legal constructs.[127] The tribal court relied upon its own authority for the background policy relating to tribal sovereign immunity[128] and many federal court cases for much of the remainder of the issues. All of this was intertribal common law.

*Strategic Wealth Management* is the perfect example of how tribal law is fair. Patrick Sizemore, president of SWM, and Mark Sizemore, president of Paradigm, were brothers who worked for years in Indian Country, tailoring their businesses to tribal clients.[129] They represented themselves and their businesses as being able to bridge the gap between on-reservation tribal capital and off-reservation business investment opportunities—experts in both finance and investment, *and* in relevant federal Indian law.[130] The question of tribal sovereign immunity should not have been a surprise when they negotiated their contract with the Tribes.

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123. *Id.* at 6148.

124. *Id.* at 6155.

125. *See id.* at 6148–49 (citing the contract and arbitration clauses and describing the arbitration proceedings); *id.* at 6152 (citing, among other authorities, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) and Guardipee v. Confederated Tribes of Grand Ronde, 19 Indian L. Rep 6111, 6111 (Confederated Tribes of the Grand Ronde Community of Or. Tribal Ct. June 11, 1992), for the proposition that the Tribes retained immunity from suit).

126. *See id.* at 6148–51 (citing TRIBAL COURT ORDINANCE § 310(d)(1)(A)).

127. *See id.* at 6150–51 (citing, among other authorities, Strate v. A-1 Contractors, Inc., 520 U.S. 438 (1997), Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), and Montana v. United States, 450 U.S. 544 (1981)); *see also id.* at 6154–55 (examining the applicability of the Anglo-American waiver, res judicata, and justiciability defenses).

128. *See id.* at 6152 (citing *Guardipee*, 19 Indian L. Rep at 6111).

129. The Author became familiar with SWM during his experience as in-house counsel for the Pascua Yaqui Tribe of Arizona in 1998 and 1999.

130. *See Strategic Wealth Mgmt., Inc.*, 32 Indian L. Rep. at 6148.

Tribal courts also decide tort and contract claims brought against Indian tribes, tribal government officials, and tribal entities using intertribal common law. Many student commentators, and even the Supreme Court,[131] have criticized tribal sovereign immunity as a tool whereby tribal defendants avoid liability,[132] but the on-the-ground reality defies conventional wisdom. Tribal defendants often waive their immunity.[133]

Moreover, they are insured, either in accordance with tribal or federal law.[134] Modern tribal court cases adjudicating tort claims often do so with nonmember-owned insurance companies as parties. *Lee v. Little Lodge Headstart*[135] and *Sullivan v. Mashantucket Pequot Gaming Enterprise*[136] are instructive. *Lee* exemplifies the reality of a tribal government's tort liability when operating governmental services funded in part by federal funds.[137] Federal law mandates that the tribal government and its entities acquire adequate insurance and further mandates that the insurance carrier not invoke tribal sovereign immunity.[138] The *Lee* Court held that the tribal defendant was entitled to a dismissal of the claims brought against it on the basis that it retained immunity from suit but declined to dismiss the tribal entity's insurance carrier.[139]

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131. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998).

132. *E.g.*, Brian C. Lake, Note, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 COLUM. BUS. L. REV. 87, 88 (1996) (citing unawareness and involuntary assumption of the risk as two fundamental problems of extending unlimited sovereign immunity to off-reservation tribal businesses).

133. *See* R. Spencer Clift, III, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177, 180 (2003) ("[A]s a practical matter and business decision [tribes will oftentimes] . . . waive sovereign immunity in certain legal fora in order to garner valuable . . . commercial interaction with the private and public sectors.").

134. Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. INDIAN L. REV. 309, 336, 340–41 (2000).

135. Lee v. Little Lodge Headstart Program, No. 02C-0366 (Three Affiliated Tribes of the Fort Berthold Reservation Dist. Ct. Nov. 1, 2004) (on file with Author).

136. Sullivan v. Mashantucket Pequot Gaming Enter., 32 Indian L. Rep. 6128 (Mashantucket Pequot Tribal Ct. May 31, 2005).

137. *See Lee*, No. 02C-0366, at 8.

138. 25 U.S.C. § 450f(c) (2000).

139. *See Lee*, No. 02C-0366, at 7–12. The Court relied upon the common law of federal and state courts, as well as other tribal courts, to conclude that the Little Lodge Headstart Program was entitled to raise sovereign immunity. *See id.* at 5 (citing, among other authorities, Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505 (1991); Gavle v. Little Six, Inc., 534 N.W.2d 280 (Minn. Ct. App. 1995); Clement v. LeCompte, 22 Indian L. Rep. 6111 (Cheyenne River Tribal Ct. App. Jan. 12, 1994); Davis v. Mille Lacs Band, No. 96 CV 701 (Mille Lacs Band of Chippewa Indians Tribal Ct.

The *Sullivan* case demonstrates how tribal sovereign immunity operates when the tribal defendant is a tribal business enterprise.[140] The Mashantucket Pequot Tribal Nation waived its immunity from suit arising out of claims made by its gaming and resort enterprise patrons.[141] The Nation waived its immunity for damage awards not exceeding "actual damages" and for pain and suffering not exceeding "100% of the actual damages sustained."[142] *Sullivan* is an uncomplicated case whereby the court took evidence and heard testimony regarding an accident that occurred at the Foxwoods casino.[143] Both *Lee* and *Sullivan* involved nonmembers and were resolved by a tribal court applying intertribal common law. Likely for business reasons, the tribal court applied Anglo-American versions of tort law to the claims of nonmembers.

All four of these cases—and there are many, many more with similar patterns—involved nonmembers and the application by tribal courts of intertribal common law to resolve these disputes.[144] Tribal courts will resolve tort claims involving nonmembers as an Anglo-American legal construct using intertribal common law.[145] The same is true for sovereign immunity and the analysis undertaken by the *Sullivan* court for determining the tort claimant's "actual damages."[146]

The *Sullivan* opinion demonstrates how tribal courts have developed in the last three decades. The tribal court relied upon its own precedent in most instances, citing to Connecticut law or American legal treatises where its own common law was silent.[147]

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Sept. 30, 1996)).

140. *Sullivan*, 32 Indian L. Rep. at 6128.

141. *See* David D. Haddock & Robert J. Miller, *Can a Sovereign Protect Investors from Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL & EMERGING BUS. L. 173, 194–95 & n.101 (2004) (citing Mashantucket Pequot Tribal Nation, TRIBAL LAWS AND RULES OF COURT tit. IV (2001), *available at* http://www.tribalresourcecenter.org/ccfolder/mpequot1.htm#title4 (last visited Sept. 21, 2006)).

142. *Sullivan*, 32 Indian L. Rep. at 6130 (quoting Mashantucket Pequot Tribal Nation, TRIBAL LAWS AND RULES OF COURT tit. IV, ch. 1, § 4(a), (d) (2001)).

143. *See id.* at 6129–32 (applying state common law to resolve a tort claim).

144. *Id.* at 6128, 6130–31; *Lee*, No. 02C-0366, at 1–2 (Three Affiliated Tribes of the Fort Berthold Reservation Dist. Ct. Nov. 1, 2004) (on file with Author); Muscogee (Creek) Nation v. One Thousand Four Hundred Sixty Three Dollars and 14/100, 32 Indian L. Rep. 6133, 6134 (Muscogee (Creek) Nation Sup. Ct. Apr. 29, 2005); Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc., 32 Indian L. Rep. 6148, 6150 (Confederated Tribes of the Grand Ronde Community. of Or. Tribal Ct. Aug. 5, 2005).

145. *See* Cooter & Fikentscher, *supra* note 11, at 552 ("One Pueblo told us that . . . pain and suffering are not compensated in tribal law[—]'You live with it . . . .'").

146. *See Sullivan*, 32 Indian L. Rep. at 6129–32.

147. *Id.*

As tribal courts hear more and more cases, they will be more capable of relying upon their own precedents, rather than importing federal, state, and other tribal court decisions. This exemplifies the ongoing process of tribal courts adapting Anglo-American common law in cases involving nonmembers. The oldest tribal courts of record adopted and imported Anglo-American precedents for use in cases involving nonmembers.[148] The next generation does the same, but also relies upon the precedents of older generations of tribal courts.[149] The process suggests that importation and adaptation of Anglo-American common law is useful for tribal courts when resolving disputes involving nonmembers—and that this process will continue.

Intertribal common law is a mixture of tribal common law, as well as the common law decisions of other tribal courts, federal courts, and state courts. While there is a definite mixture of authorities, there is no instance where a tribal court has chosen to depart in an unusual manner from the established common law of other jurisdictions once adopted. In short, it is unusual to find a tribal court decision involving nonmembers that would depart in a radical manner from the way a state or federal court would decide the case. If the Supreme Court is concerned about the unfairness of tribal substantive law as it applies to nonmembers, it need not worry.

Take "due process," for example, the area of law Justice Souter pounced on.[150] Dean Newton stated that tribal courts do not follow state and federal precedent "jot-for-jot," but that sounds much worse than it is. Dean Newton would agree that tribal courts' interpretations are well within the parameters of the due process that state and federal courts apply.[151] Due process is one of the more subjective legal doctrines in the law.[152] State and federal courts tend to apply a balancing test,[153] reaching results that differ from other

148. *Id.* at 6129–30.

149. Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (Part I), 46 AM. J. COMP. L. 287, 327 (1998) (indicating the importance of institutional memory among tribal judges).

150. Nevada v. Hicks, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

151. *Cf.* Newton, *supra* note 74, at 297 ("[S]tudents and scholars approaching tribal court opinions with respect for the tribal context would not automatically criticize deviations from state or federal law, but would understand that difference does not always mean inferiority.").

152. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (calling the "guideposts" for substantive due process decisionmaking "scarce and openended" (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992))).

153. *See* Mathews v. Eldridge, 424 U.S. 319, 321 (1976) (creating a test for due process cases that balances three factors: (1) private interest affected; (2) risk of erroneous deprivation; and (3) government interests).

courts in often dramatic ways. A California resident and citizen, where the notion of "substantive due process" is incorporated into the state's constitutional law,[154] might be subject to a U.S. Supreme Court still cringing from its own substantive due process jurisprudence.[155] Due process as envisioned by the framers of the Constitution might be nothing like the due process the Court now applies.[156] Why should Justice Souter hold Indian tribes to a "jot-for-jot" standard when the Court does not (and cannot) hold state and federal courts to the same standard?[157] While the Rosebud Sioux tribal court might not apply due process the same way as the Little River Band of Ottawa Indians tribal court, they might apply the doctrine the same as Idaho, South Dakota, or Michigan courts.[158] In fact, the Court's own due process jurisprudence has built-in expectations of variation.[159]

As tribal courts decide more cases, they will have more opportunity to rethink these common law choices, just as federal and state courts rethink their own common law choices. Every Indian tribe is a laboratory for innovation.[160] Every court may live by Justice Holmes's dictum:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[161]

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154. CAL. CONST. art. I, § 7.

155. *E.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 690–91 (1999) (finding the expanding due process approach a distasteful tool for achieving legislative flexibility); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–64 (1992) (justifying a malleable view of due process based on changing understandings of facts over time).

156. *See generally* STEPHEN BREYER, ACTIVE LIBERTY 15–38 (2005) (describing the Constitution as a "continuing instrument" of government that will apply to changing subject matter).

157. *Compare* Sheppard v. Sheppard, 655 P.2d 895, 901 (Idaho 1982) (advancing full faith and credit to tribal court orders and judgments), *with In re* Marriage of Red Fox, 542 P.2d 918, 920 (Or. Ct. App. 1975) (applying rules of comity, not full faith and credit, to tribal court orders and judgments).

158. *See, e.g.*, Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 80–81 (1930) (holding that states may adopt differing types of appeals processes without violating the due process clause).

159. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

160. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

161. OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1920).

Over time, tribal courts may incorporate the necessary custom and tradition—and stories—of the tribal community into its own common law. This incorporation must be gradual, but it is a must if the tribal common law is to have value for the community.

### *B. Intratribal Common Law*

*1. The Theory.* "Intratribal common law" is the common law applied by tribal courts in cases arising out of an Indigenous legal construct.[162] Intratribal common law, in a normative sense, should be the law that a tribal court would apply, a law that relies on tribal custom and traditional law and norms. Intratribal common law also may be the "law" that traditional or nonadversarial tribal courts, such as peacemaker courts, use to resolve disputes.[163] In a practical sense, however, many tribes have not yet recovered their customs and traditions in a manner that is useful in this regard. Regardless, cases resolved using intratribal common law tend to involve tribal members to the exclusion of all others, with the exception of nonmember Indians and nonmembers who consent to the application of intratribal common law.

An "Indigenous legal construct," in contrast to an "Anglo-American legal construct," is a legal construct that originates within the tribal community. The form of government that a tribal community chooses may be indigenous in origin, such as the so-called "theocratic" government of many of the Pueblos in the desert southwest.[164] The canoe ownership traditions of the Pacific Northwest tribes, handed down from generation to generation, originated from within the community.[165] The inheritance rules of a community, whether they are matrilineal, patrilineal, or neither, tend to originate from within the community.[166] Any legal construct not imposed or imported from the non-Indian political communities should be classified as an Indigenous legal construct.

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162. *See, e.g.*, Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 229–30 (1989) (examining applicable law in Navajo tribal courts and characterizing the law as Navajo "customary," or common, law).

163. *Id.* at 230.

164. *See* JOHN R. WUNDER, "RETAINED BY THE PEOPLE": A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 10–11 (1994); Angela R. Riley, *Sovereignty and Illiberalism*, 95 CAL. L. REV. (forthcoming 2007) (manuscript at 15, on file with Author).

165. *See* VINE DELORIA, JR., INDIANS OF THE PACIFIC NORTHWEST 32–33 (1977).

166. *See* Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97, 97–98 (2004) (describing the origins of various traditions of Pueblos).

Applying intratribal common law—in cases involving members and the tribe—to the exclusion of the laws of nonmember communities should be the goal of all tribal courts, but it may be a goal that is slow in coming. Discovering the tribe's customs and traditions—and the tribe's stories—may take time. Learning how these customs and traditions apply to the decisionmaking analyses of tribal courts may take even longer. But it is a worthy and necessary goal. As it stands right now in many tribal jurisdictions, tribal courts decide disputes between members with reference to federal and state law more often than not.[167] Professor Kevin Washburn wrote that, in the area of criminal law, for example, imported federal and state criminal laws and law and order codes do not match with tribal cultures.[168] Professor Washburn argues that a tribal community "defines what it values and what it abhors" in enacting criminal laws.[169] Tribal communities that import state and federal criminal laws into Indian Country do so at a great risk to the preservation of community norms and culture.

Intratribal common law is the heart of the intersection of tribal law and culture. As noted by Professor Christine Zuni Cruz, tribal courts that do not apply custom and tradition in this context, relying instead on federal and state law, "participate . . . in their own ethnocide."[170] Here is where Indian tribes and Indian people reach back into the past to relearn the old stories, to learn what it means to be Indian, and to learn how Indian people resolve these kinds of internal disputes.[171] For example, although federal Indian law and policy has depleted much of Indian Country, a great deal remains undisturbed.[172] Intratribal common law is strongest in these places. Here is where Indian people, Indian tribes, and tribal courts take what they can from custom and tradition and apply it to the disputes of today, to the extent that they differ from the disputes of the past. Here, then, is the other part of tribal common law, a part

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167. *See* Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL'Y 74, 94–95 (1999) (analyzing sources of law relied upon by tribal courts in 359 cases published in the Indian Law Reporter).

168. *See* Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 836–37 (2006) (stating that the Major Crimes Act, enacted by Congress in 1885, has led to a situation in which "a community alien and external to the tribal communities" has defined criminal offenses for the tribes).

169. *Id.* at 834.

170. Zuni, *supra* note 102, at 24.

171. *See id.* at 26 ("The sources of common law are the members of tribal society who were raised traditionally.").

172. *See id.* at 27 ("Individual tribes face the challenge to develop an indigenous system[;] . . . in the face of imposed mandates . . . the spirit of resistance is alive.").

that exists parallel to intertribal common law and that tribal courts apply in specific and relevant contexts—contexts not including nonmembers.

*2. The Practice.* The classic example of the use of intratribal common law is where a dispute arises between two members (or the tribe) involving tribal lands with "spiritual significance to the group."[173] In some Indian communities, the location of the land may not be disclosed, nor may the law that would decide the dispute.[174] These disputes touch members to the exclusion of all nonmembers by definition. But most disputes arising out of Indigenous legal constructs may be discussed in some manner, although published tribal court opinions relating to the disputes may be difficult to locate.

Part of the theory of intratribal common law is discovering the relevant customs and traditions of an Indian community. While many scholars have located and published the customs and traditions of several tribal communities,[175] most tribes have not had the benefit of this kind of scholarship. The relevant stories are yet to be discovered.[176] But there are a few tribal court cases that exemplify the application of intratribal common law.

Tribal courts decide family law cases involving members (and even nonmembers who consent) using intratribal common law. *Polingyouma v. Laban* is a case that recites customary and traditional law before applying that law to modern Hopi life.[177]

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173. Newton, *supra* note 74, at 306 n.71.

174. *See id.* at 306 & n.71 (noting a property claim on land with spiritual significance and within a tribe's ancient land).

175. *E.g.*, GEORGE COPWAY, THE TRADITIONAL HISTORY AND CHARACTERISTIC SKETCHES OF THE OJIBWAY NATION v, ix–x (1850) (providing "a sketch of [Ojibway] [N]ation's history, describing its home, its country, and its peculiarities"); LLEWELLYN & HOEBEL, *supra* note 13, at vii–viii (explaining that the authors have "aimed at the development of a social science instrument for the recording and interpretation of law-ways among . . . the Cheyennes"); MARY SHEPARDSON, NAVAJO WAYS IN GOVERNMENT 3–4 (1963) (advancing a "functional analysis of Navajo politics against a background of the main historical events . . . and a sketch of Navajo economy and traditional Navajo social structure"); STRICKLAND, *supra* note 15, at xi–xii (studying the Cherokees who were moved from Georgia to Oklahoma in 1838 and 1839); Steven M. Karr, *Now We Have Forgotten the Old Indian Law: Choctaw Culture and the Evolution of Corporal Punishment*, 23 AM. INDIAN L. REV. 409, 409, 410 n.2 (1999) (discussing the Choctaw, Cherokee, Chickasaw, Creek, and Seminole cultures); Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 175–76 (1994) (reviewing the character of "Navajo justice" and comparing it to Anglo law).

176. *See* BORROWS, *supra* note 15, at 25–26 ("[M]uch of the information is acquired . . . through years of study and hard work.").

177. Polingyouma v. Laban, 25 Indian L. Rep. 6227, 6228 (Hopi Tribe App. Ct. Mar. 28, 1997).

The case involved an appeal of a child custody decision reached at the trial court level whereby the trial court decided to award equal periods of physical custody to both parents.[178] The appellate court took judicial notice of "three aspects of Hopi custom concerning children. Under traditional Hopi practice, a child is born into her mother's clan, lives with the mother's household and receives ceremonial training from the mother's household."[179] The court then "tested" the custom "for relevancy . . . in the context of modern Hopi life."[180] Hopi custom seemed to imply that the mother should have retained full custody. To uphold the trial court's order, however, the court relied upon the fact that the parents wanted the child to remain in Hopi Day School at Hopi and the representation by the father that he would relocate to Hopi to avoid disrupting the child's education.[181] Anglo-American courts would not have considered custom and tradition at all, let alone this particular Hopi custom. *Polingyouma* was a case involving members engaged in a family dispute. The tribal court should and did apply intratribal common law to resolve the dispute.

Disputes between members over rights to tribal lands are another type of case best decided in accordance with intratribal common law. *Ross v. Sulu*[182] was a case arising out of a dispute over claims to land within the Hopi reservation by different clans at the First Mesa.[183] The Hopi Constitution provided that the local village there, the Village of First Mesa, had "the power to assign farming land."[184] The Hopi intratribal common law provided that each village had the discretion to adopt modern, or Anglo-American-style, governmental structures, but unless they did so, "they [were] considered as being under the traditional Hopi organization."[185] "The Village of First Mesa [had] not adopted a village constitution . . . . [and] therefore, remain[ed] under the traditional[, intratribal, law] . . . ."[186] The Hopi appellate court ruled that the lower court could not have

178. *See id.*

179. *Id.*

180. *Id.*

181. *See id.*

182. Ross v. Sulu, No. CIV-023-88 (Hopi Tribe App. Ct. July 5, 1991), *available at* http://www.nativelegalnet.org/Data/DocumentLibrary/Documents/1041966042.59/Patsy%20Ross%20%26%20Burke%20Adams%20vs%20Tom%20Sulu%2C%20as%20Tewa%20Kachina%20Clan%20L.pdf.

183. *See id.* at 1.

184. *Id.* at 4–5 (citing HOPI CONST., *available at* http://www.ntjrc.org/ccfolder/hopi_const.htm (last visited Sept. 21, 2006)).

185. *Id.* at 5–6.

186. *See id.* at 6.

exercised jurisdiction in the dispute at issue in *Sulu*.[187] Hopi law allows for traditional villages to resolve certain disputes over land exclusive of tribal court jurisdiction.[188] *Sulu* exemplifies a case involving disputes between tribal members to the exclusion of all others. Under Hopi law, it was appropriate to resolve the dispute utilizing intratribal law. In that instance, the relevant intratribal law even precluded the tribal court from exercising jurisdiction over the matter.

Tribal government disputes and constitutional law questions are another area where tribal courts can and should apply intratribal common law. Here, tribal courts are confronted with tribal governments that are Anglo-American legal constructs; that is, the federal government more often than not imposed a form of government on the tribe based on outside models such as municipal governments or the federal government structure.[189] The form a tribal government takes is a decision that originates from within, in theory, but most tribal governments mirror Anglo-American governmental structures in important respects. In these cases, tribal courts *adapt* intertribal common law and apply the modified laws as intratribal common law.[190] Again, because these cases are wholly tribal, nonmember rights are not implicated. *Certified Question II: Navajo Nation v. MacDonald* exemplifies this adaptation of intertribal common law in a tribal governmental dispute.[191] The relevant question presented was whether the Navajo Tribal Council had authority to place the

187. *See id.* (explaining that the tribal court lacked jurisdiction over an "intravillage dispute between clans over a matter reserved for village decision").

188. *See id.* at 6–7.

189. *See* NEWTON ET AL, *supra* note 31, § 4.06[2][a] (identifying that under the Indian Reorganization Act (IRA), Congress authorized the Secretary of the Interior's involvement in tribal governmental matters, including elections and constitutional amendments). In many cases, the Secretary of Interior's authority to disapprove new tribal constitutions impeded the discretion of tribes to form an organic tribal government structure. *See* Matthew L.M. Fletcher, *The Insidious Colonialism of the Conqueror: The Federal Government in Modern Tribal Affairs*, 19 WASH. U. J.L. & POL'Y 273, 279 (2005) ("[T]his requirement allows the federal government to decide elemental questions of tribal law that should be decided by the tribe alone."); Joranko & Van Norman, *supra* note 110, at 84 ("By continuing secretarial review of IRA tribal constitutions, Congress left in place a significant obstacle to true Indian self-determination.").

190. *See, e.g.*, Turtle Mountain Judicial Bd. v. Turtle Mountain Band of Chippewa Indians, No. 04-1126, at 5 (Turtle Mountain Tribal App. Ct. 2005), http://www.turtle-mountain.cc.nd.us/pp_cases/2005_cases/Judicial%20Board%20v%20TMB%20Opinion.doc (drawing upon federal and other tribes' common law where the tribe's common law was silent); Snowden v. Saginaw Chippewa Indian Tribe of Mich., 32 Indian L. Rep. 6047, 6050 (Saginaw Chippewa Indian Tribe of Mich. App. Ct. Jan. 7, 2005) (same).

191. Certified Question II: Navajo Nation v. MacDonald, 16 Indian L. Rep. 6086, 6087 (Navajo Sup. Ct. Apr. 13, 1989) (stating that a Navajo statute governs when the Navajo Tribal Council may remove a probationary judge).

tribal chairman on administrative leave pending an investigation into alleged criminal activity.[192] The Nation has no written constitution,[193] so the tribal court adapted intertribal common law to resolve the dispute.[194] The court relied upon the fact that the chairman's authority was derived in all respects from acts and delegations of the tribal council.[195] The court implied from that reality that the tribal council also retained the authority to "withdraw, limit, or supervise the exercise of powers it has bestowed on the offices of Chairman."[196] From that holding, the Court concluded the tribal council could place the Chairman on administrative leave.[197] The Navajo court began its analysis with the Secretarial regulations creating the Navajo government structures, which are, of course, Anglo-American structures. But the court stayed away from blind reliance upon federal and state law common law precedents. It was, after all, an internal matter to be decided, as much as possible, by intratribal common law.

The practice of applying intratribal common law establishes that there can be a clear line delineating between the laws that may be used to resolve disputes between members and tribal entities, and those disputes whose subject matters arise out of Indigenous legal constructs. Nonmembers, unless they consent *and* the community consents, are not affected by intratribal law.

## IV. TOWARD RECOGNITION OF TRIBAL COURT CIVIL JURISDICTION OVER NONMEMBERS

The development and theorization of intertribal and intratribal common law may assist Indian tribes and their advocates in educating the federal judiciary of the on-the-ground reality of tribal court civil jurisdiction over nonmembers. To be certain, there appears to be a great deal of apprehension emanating from the Court about the possibility of this nonconsensual exercise of jurisdiction, but a little education may go a long way.

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192. *See id.* at 6090.

193. *See* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW 429 (5th ed. 2005).

194. While the court relied upon intratribal common law, it should be noted that the chairman's office and the Tribal Council, created by regulations promulgated by the Department of Interior, were both Anglo-American legal constructs. *See MacDonald*, 16 Indian L. Rep. at 6090.

195. *See id.* at 6091.

196. *Id.*

197. *See id.* at 6092 ("The Navajo Tribal Council can place a Chairman or Vice Chairman on administrative leave with pay if they have reasonable grounds to believe that the official seriously breached his fiduciary trust to the Navajo people . . . .").

### *A. Correcting the Misunderstanding*

Cases where nonmembers challenge the jurisdiction of tribal courts are consistent with a theory differentiating between intertribal and intratribal common law. The recent case, *Smith v. Salish Kootenai College*,[198] is a typical tribal court case involving a nonmember.[199] Victims of an auto accident on the Flathead Indian Reservation sued the nonmember in tribal court in a wrongful death action.[200] The nonmember then filed a cross-claim against his co-defendant, also in tribal court.[201] After losing at trial, the nonmember sought to challenge tribal court jurisdiction in federal court.[202]

*Smith* involved the tribal court's application of intertribal common law. Wrongful death is an Anglo-American legal construct, and the tribal court applied, as tribal statutory law required, Anglo-American common law in instructing the jury on negligence as embodied in the Restatement (Second) of Torts.[203] The nonmember's first argument on appeal before the tribal appellate court involved the best evidence rule, another Anglo-American legal construct.[204] The nonmember's final argument on appeal before the tribal appellate court was an attempt to convince the court to reject the American common law rule that evidence concerning the insurance coverage of the parties is inadmissible, as stated in Federal Rule of Evidence 411.[205] The tribal appellate court affirmed the tribal court's refusal to allow the nonmember to question witnesses and jurors about insurance.[206] Like so many other tribal court cases, this case did

198. Smith v. Salish Kootenai Coll., 434 F.3d 1127 (9th Cir. 2006) (en banc).

199. Many tribal court cases involving nonmembers as defendants, where the nonmember contests jurisdiction, are tort claims. *E.g.*, Strate v. A-1 Contractors, Inc., 520 U.S. 438 (1997) (reviewing a personal injury action); Allstate Indem. Co. v. Stump, 191 F.3d 1071 (9th Cir. 1999) (evaluating jurisdictional issues related to an insurance claim arising from tortious conduct).

200. *Smith*, 434 F.3d at 1129.

201. *Id.*; *see also* Smith v. Salish Kootenai Coll., No. AP-99-227-CV, at 1–4 (Confederated Salish and Kootenai Tribes App. Ct. 2003), *available at* http://www.umt.edu/lawinsider/library/tribal/cs&k/opinions/SmithSKC.pdf.

202. *See Smith*, 434 F.3d at 1129–30.

203. *See Smith*, No. AP-99-227-CV at 10–11 (citing RESTATEMENT (SECOND) OF TORTS § 874A cmt. e (1977)); Laws of the Confederated Salish & Kootenai Tribes § 4-1-104 (2003), http://www.umt.edu/lawinsider/library/tribal/cs&k/code2003/intro.pdf#search=%22%22Laws%20of%20the%20Confederated%20Salish%20and%20Kootenai%20Tribes%22%22 (instructing tribal courts to first apply intratribal law and then to apply applicable federal law).

204. *See Smith*, No. AP-99-227-CV at 5–7.

205. *See id.* at 13–14 (citing FED. R. EVID. 411).

206. *See id.* at 14.

not involve the kind of law that would tend to confuse nonmembers. If anything, in an attempt to bring evidence about insurance before the jury, the nonmember defendant attempted to exploit the fact that state and federal law is not controlling in tribal court decisions by questioning witnesses and jurors about insurance. From beginning to end, this case involved Anglo-American legal constructs and state and federal common law interpreted by a tribal court. There was no unfairness to that nonmember litigant—the tribal court decided the case the same way a state or federal court would have.

Empirical studies of tribal court decisions involving nonmembers confirm the result in *Smith*. Dean Newton characterizes *Middlemist v. Member of the Tribal Council of the Confederated Salish and Kootenai Tribes*,[207] a case involving the challenge to tribal regulatory jurisdiction brought by nonmember irrigation districts, as a "striking example of sensitivity to tribal traditions,"[208] but the result in the case mirrored the result that the nonmembers would have achieved in state or federal courts.[209] Dean Newton reviewed as many as thirty-seven tribal court cases involving nonmembers and concluded that nonmember litigants had been treated in a fair manner.[210] Professor Mark Rosen, reviewing civil rights cases brought in tribal courts, also agreed that "[m]ost of the cases are examples of responsible and good faith interpretation of [applicable law], and none of the cases involves patently outrageous reasoning or outcomes."[211] All of the cases reviewed by Professor Rosen involved Anglo-American legal constructs, and the tribal courts decided all of the cases employing intertribal common law.[212]

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207. Middlemist v. Member of the Tribal Council of the Confederated Salish & Kootenai Tribes, 23 Indian L. Rep. 6141 (Confederated Salish & Kootenai Tribes App. Ct. June 29, 1996).

208. Newton, *supra* note 74, at 306.

209. *See id.* at 307. (noting that the tribal court decision in *Middlemist* required the exhaustion of tribal administrative remedies before challenging the tribe's jurisdiction).

210. *See id.* at 352 ("[T]he tribe does not always win against the individual, and the tribal member does not always defeat the non-Indian.").

211. Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 573 (2000).

212. *See id.* at 573–75 (citing, among other authorities, Schumacher v. Menominee Indian Tribe of Wis., 24 Indian L. Rep. 6084 (Menominee Tribal Sup. Ct. Jan. 30, 1997) (perfection of security interest in collateral)); Muskogee (Creek) Nation v. Am. Tobacco Co., 25 Indian L. Rep. 6054 (Muscogee (Creek) Nation Okmulgee D. Ct. Feb. 12, 1998) (reviewing the rules of personal service); Means v. Dist. Court of the Chinle Judicial Dist., 26 Indian L. Rep. 6083 (Navajo May 11, 1999) (reviewing a criminal misdemeanor against nonmember Indian decided on federal equal protection grounds); Shoshone Bus. Council v. Skillings, 21 Indian L. Rep. 6050 (Shoshone & Arapahoe Tribal Ct. App. 1994)

Professor Bethany Berger's recent article, *Justice and the Outsider*,[213] is perhaps the most detailed look at the empirical evidence relating to the fairness of tribal courts to outsiders. Professor Berger analyzed the decisions of the Navajo Nation's tribal courts where a nonmember is a party.[214] In ninety-five Navajo Nation Supreme Court opinions where a non-Navajo party opposed a Navajo party, the non-Navajo party won half of the cases.[215] Relying upon a theory that parties with accurate information "will settle or fail to pursue cases in which they agree that one party is significantly more likely to win,"[216] Berger concludes that "non-Navajo parties are at least as good at predicting their chances of success as are Navajo parties."[217] The result "tends to undermine the assumption that the courts are unfair to these outsiders."[218]

Though it is very difficult to draw comprehensive conclusions about tribal court fairness to outsiders from these small samples, it is notable that no study found evidence of the kind of unfairness that concerns the Court.

### *B. Theorizing the Presumption of Tribal Court Jurisdiction*

In the coming years, the Supreme Court may decide to review a case where a *member* sues a *nonmember* in tribal court for committing a tort *on reservation land*.[219] The open question of the presumption of tribal court jurisdiction over nonmembers will then be before the Court.[220] While tribal sovereignty will be weighed against the political rights of American citizens, the fundamental practical question is whether nonmembers will have their meaningful day in court. This Article's premise is that

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(reviewing a tribal membership issue)).

213. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

214. *See id.* at 1067.

215. *See id.* at 1075 (reporting that of the ninety-five cases examined, the non-Indian party won 47.4%, but noting that until a recent surge in (often unsuccessful) challenges to tribal jurisdiction the rate was 50%).

216. *Id.* at 1076 & n.161 (citing George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 51–52 (1984)).

217. *Id.* at 1077.

218. *Id.*

219. This is a different fact situation than *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 438 (1997) (involving a nonmember plaintiff and an off-reservation accident) and *Nevada v. Hicks*, 533 U.S. 353, 355 (2001) (involving a state law enforcement officer as a defendant).

220. *See Hicks*, 533 U.S. at 358 & n.2 (quoting *Strate*, 520 U.S. at 453 and citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)) ("We leave open the question of tribal-court jurisdiction over nonmember defendants in general.").

nonmembers will not be subject to "unusually difficult," confusing, unfair, or unfamiliar substantive law. As such, the Court should rule—as it suggested in *National Farmers Union*—that tribal courts may be presumed to have civil jurisdiction over nonmembers for disputes arising in Indian Country.[221]

The Court's concerns that nonmember litigants will have important or even fundamental rights limited or even erased in tribal fora is belied by the realities of federal and state court practice. Commentators have long known that litigants and attorneys remove cases from state courts to federal courts under the federal removal statute[222] because the defendants wish to employ *procedural* (not substantive) strategic ploys such as delay[223] or because the defendant's *attorney* (not client) is unfamiliar with state or local courts.[224] In addition, many state courts adjudicate cases of first impression on any number of subjects of law.[225] Sometimes jurisdictions differ on whether to adopt a particular rule.[226] This is all part of Justice Brandeis's vision of each jurisdiction serving as part of a "laboratory" of experimentation. Tribal courts may be a part of the "'jurisgenesis'" of tribal law and culture,[227] as well as part of the learning from experience that all courts can do for each other. After all, the Founders took from English common law what they wanted and left the rest.[228]

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221. *See supra* note 39.

222. 28 U.S.C. § 1441 (2000).

223. *See* Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1089 (1989) (noting that defendants remove cases hoping the delay will deplete the plaintiff's resources).

224. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 402–03 (1992) (reporting that 77% of defense lawyers based removal decisions on their familiarity with the federal system).

225. *E.g.*, Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15, 21, 23 (Alaska 1978) (adopting a common law doctrine of economic duress); Seehafer v. Seehafer, 704 N.W.2d 841, 843, 847 (N.D. 2005) (adopting rule that "[a] spouse of a deceased joint tenant cannot claim a probate homestead on her husband's property when his interest in that property terminated on his death and she held no interest of her own in the property"); Cincinnati Bar Ass'n v. Kathman, 748 N.E.2d 1091, 1095, 1097 (Ohio 2001) (adopting a common law rule that licensed attorneys "aid" in unauthorized practice of law when they assist nonattorneys in marketing or selling living trusts).

226. *Compare, e.g.*, Mills v. Wyman, 20 Mass. 207 (1825) (adopting and applying the material benefit rule in contract cases), *with* Harrington v. Taylor, 36 S.E.2d 227, 227 (N.C. 1945) (refusing to adopt the material benefit rule).

227. *See* Chamberlain v. Peters, 27 Indian L. Rep. 6085, 6096 (Saginaw Chippewa Indian Tribe of Mich. App. Ct. Jan. 5, 2000) (quoting Robert Cover, *Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983)); POMMERSHEIM, *supra* note 82, at 101 (attributing the term to Robert Cover); WILLIAMS, JR., *supra* note 56, at 20 (same).

228. *E.g.*, Grosjean v. Am. Press Co., 297 U.S. 233, 249 (1936).

> In the light of all that has now been said, it is evident that the restricted rules of

On a pragmatic level, difficult tribal common law decisions can be explained. The Court already noted a mechanism in place to alleviate the concerns about "unusually difficult" tribal substantive law.[229] Justice Stevens' *National Farmers Union* opinion argued that federal courts reviewing tribal court jurisdiction can utilize the opinions generated by those tribal courts to understand tribal law.[230] The Court has not yet followed Justice Stevens' lead and examined a tribal court case for the purpose of understanding intertribal common law. Both of the tribal court cases cited by Justice Stevens involved nonmembers as parties. *Crow Creek Sioux Tribe v. Buum* involved a tribal court judgment excluding a non-Indian from the Crow Creek Sioux Reservation for a period of one year and, when the nonmember violated the order, to ten days of confinement and a fine.[231] All of the legal questions in the *Buum* matter were Anglo-American legal constructs that the tribal appellate court resolved using intertribal common law. These Anglo-American legal constructs included the notion of a "public nuisance,"[232] the difference between a civil judgment and a criminal penalty,[233] and "due process."[234] In *Buum*, the appellate court reversed the exclusion order on due process grounds, holding that the tribal court must meet several "due process" conditions in order to effectuate a civil exclusion order.[235] The tribal courts didn't rely upon "unusually difficult" tribal substantive law to prejudice the nonmember and, in fact, ruled in favor of the nonmember.

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> the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods.

*Id.*

229. *See* Barsh, *supra* note 167, at 81–82 (finding "tribal common law" often based on Anglo law and tribal courts disfavoring grounding their decisions on tradition even in internal social cases).

230. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) (citing N.D. *ex rel.* Wefald v. Kelly, 10 Indian L. Rep. 6059, 6060 (Standing Rock Sioux Tribal Ct. Oct. 4, 1983) (explaining the Standing Rock Sioux Tribal Code) and Crow Creek Sioux Tribe v. Buum, 10 Indian L. Rep. 6031, 6032 (Intertribal Ct. App. Apr. 1, 1983) (explaining the Crow Creek Sioux Tribal Code)).

231. *See Buum*, 10 Indian L. Rep. at 6031.

232. *Id.* at 6032 (citing CROW CREEK SIOUX TRIBAL CODE §§ 07-07-01 to -04).

233. *See id.* at 6033 (citing S.D. CODIFIED LAWS §§ 16-15-1 to -15 (1995) and S.D. CODIFIED LAWS § 23A-38-1 (1998)).

234. *Id.* at 6034.

235. *See id.*

The Court's apparent presumption that tribal substantive law is unfair to nonmembers has no basis in fact. Tribal courts derive the substantive law that applies to nonmembers, intertribal common law, from Anglo-American common law.[236] Indian tribes adopt a statutory law that tends to mirror American laws for a reason—because they must be able to function in the American political system in a seamless manner. Because federal Indian policy drove tribal law underground for a decades-long interregnum, Indian tribes and tribal courts had to start, as a pragmatic matter, by borrowing federal and state law. Once tribal legislatures and tribal court establish a baseline of tribal law, it is natural and necessary that tribal courts will work to mold the law to meet the needs and realities of the tribal communities. Just as state and federal common law changes to accommodate community norms,[237] tribal courts will adopt changes to the intertribal common law over time. There is nothing remarkable in changing the gradual course of the common law to reflect the community's choices.[238]

## V. CONCLUSION—THE SEVENTH FIRE

> The prophet of the Seventh Fire of the Ojibwe spoke of an Osh-ki-bi-ma-di-zeeg' (New People) that would emerge to retrace their steps to find what was left by the trail. There are Indian people today who believe that the New People are with us in the form of our youngest generation. This young generation is searching for their Native language. They are seeking out the few elders who have not forgotten the old ways. They are not finding meaning to their lives in the teachings of American society. . . . This younger generation is discovering the common thread that is

236. *See supra* Part II.

237. *E.g.*, Sarah Howard Jenkins, *Preemption & Supplementation Under Revised 1-103: The Role of Common Law & Equity in the New U.C.C.*, 54 SMU L. REV. 495, 505 (2001) ("As business ethics and values evolve and community mores change, the principles of common law and equity generally evolve to accommodate and control the innovative business practices, the novel modes of ordering and modifying commercial relationships, variations in financing mechanisms, and commercial behavior that deviates from established social norms."); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 798 (2002) ("The common law method substantially minimized the impact of legal transitions. In contrast to modern comprehensive legislative action, changes in the path of the common law occurred through gradual and episodic accretions to the existing body of judge-made norms.").

238. *See* E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 288 (Atheneum 1979) (1954) ("The evolution of law as a phase of societal evolution has been no more an undeviating lineal development than has been the evolution of life forms in the organic world.").

> interwoven among the traditional teachings of all natural people.[239]

Eddie Benton-Banai's description of the New People is a plea for the next generation of Indian people—and the generation after that, and so on—to reach back to learn the language and culture of their ancestors. Just as American Constitutional law scholars reach back to revisit the foundations of the United States Constitution,[240] Indian people, lawyers, and scholars must reach back to revisit the foundations of their own laws. Traditional tribal law has all but disappeared from Indian Country, replaced with an amalgam of imposed and imported Anglo-American legal constructs.[241] Tribal judges and Indian law scholars have long advocated for the restoration of traditional and customary law, but that work is far from complete and, in some places in Indian Country, it hasn't even begun. Since tribal common law is infused with tribal culture, neither can survive in the long run without the other.

The irony of these developments is that the Supreme Court, taking a superficial look at tribal courts and tribal court jurisprudence, appears to be close to concluding that the restoration of tribal traditions and customs is complete.[242] As a result, the Court may soon rule that tribal courts may never exercise civil jurisdiction over nonmembers on the theory that tribal law is "unusually difficult for an outsider to sort out." The Court may make this final and conclusive judgment without knowing the facts on the ground. The reality is that tribal courts do not apply "unusually difficult" substantive law to cases involving nonmembers.[243] As a matter of law *and* culture, "intratribal common law," exemplified by tribal customs and traditions, does not apply to nonmembers, by definition. "Intertribal common law," the law imposed and imported into the tribal community that mirrors state and federal common law to a significant extent, is that law that tribal courts would apply to disputes involving nonmembers. Also, tribal court judges, like state and federal judges, write legal opinions that explain the

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239. EDWARD BENTON-BANAI, THE MISHOMIS BOOK 111–12 (1979).

240. *E.g.*, BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 11 (2005) (seeking, through an examination of the Court's first decade, to "locate the changing role of the judiciary as a response to an even more fundamental constitutional transformation"); AKHIL REED AMAR, AMERICA'S CONSTITUTION xii (2005) (providing an "*opinionated* biography" of the Constitution by scrutinizing the actions and decisions of the Founders and later generations of constitutional amenders).

241. *See supra* Part II.

242. *See supra* Part I.

243. *See supra* Part II.A.

application of tribal common law to a particular case. Justice Stevens wrote in 1985 that a federal court should review these opinions as necessary for explanations of tribal law and culture.[244] In the end, tribal courts decide matters of intertribal common law just as state and federal courts would.

This Article delineates a proposed line between intertribal common law and intratribal common law as a means of explaining and emphasizing the difference between tribal law that applies in some circumstances to tribal members alone and tribal law that applies to members and nonmembers both. If the Court understands the distinction, its fears of subjecting nonmembers to unfair law should be allayed. Choosing to solidify the *National Farmers Union* presumption that tribal courts do have civil jurisdiction over nonmembers should not be controversial. Even a cursory review of tribal court decisions involving nonmembers shows that nonmembers are not prejudiced in tribal courts any more than a resident of Rhode Island would be prejudiced in Texas or Connecticut.[245]

Eddie Benton-Banai's words of hope were tempered by his concern that the bullets and bayonets of early American Indian policy have been replaced with "less visible weapons."[246] He believed that non-Indians sought "to absorb Indian people into the melting pot of American society. . . . The old ways, these teachings, are seen as unnecessary to the modern world."[247] Much of Indian Country is populated by nonmembers—people who live and work on the reservation, intermarry with tribal members and raise tribal member children, and even participate in tribal politics and traditional ceremonies. A Supreme Court decision creating a bright-line rule that tribal courts cannot have civil jurisdiction over nonmembers forces more and more Anglo-American common law into Indian Country, rendering tribal custom and tradition irrelevant and useless. Over time, this will result in the continued erosion of tribal culture and tradition. Recognizing the jurisdiction of tribal courts over nonmembers would generate benefits to tribal communities—and all other American courts—through the jurisgenerative journey that tribal courts take every day in adjudicating the rights of people in Indian Country while preserving the rights of nonmembers.

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244. *See supra* note 230 and accompanying text.

245. *See supra* notes 213–218 and accompanying text (reviewing a study of Navajo courts and finding that nonmembers win almost 50% of the time).

246. BENTON-BANAI, *supra* note 239, at 111.

247. *Id.*